No. 6479

United States

Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,

vs.

FLORA H. SCARBOROUGH and FLORA H. SCARBOROUGH as Administratrix of the Estate of FLORIS SCARBOROUGH, Deceased,
Appellee.

APPELLEE'S REPLY BRIEF.

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APPELLEE'S REPLY BRIEF.

Appellant's sole contention on this appeal is that the evidence is insufficient to sustain the judgment. Therefore the only question to be determined is, does a careful examination of the record reveal sufficient evidence upon which the findings and judgment can be based?

THE FACTS.

The action is brought upon two counts by Flora H. Scarborough the mother of Floris Scarborough, deceased, a soldier who enlisted on September 25, 1917 and was honorably discharged on April 4, 1919. During his service he was granted a war risk insurance policy in the sum of Ten Thousand Dollars ($10,000.00) and paid premiums until his discharge, the insurance being in force up to and including midnight of May 31, 1919 by reason of the thirty-one day grace period. While in the service, and on October 31, 1918, he received certain gun-shot wounds on the battle field in France for which he was hospitalized four months. For some unaccountable reason, the Government failed to produce the Adjutant General's records, showing his physical condition at the date of discharge. The trial court, not having the benefit of these Government records, had to rely upon other and somewhat less satisfactory evidence, as to his exact treatment while in the service.

Mrs. Flora H. Scarborough, the plaintiff and the mother of the deceased, testified as follows (R. 21):

> "My son enlisted in the army from New York State on September 25, 1917 and was discharged April 4, 1919. I was at Buffalo when he enlisted and when he returned.
>
> My son took out a policy in the sum of $10,000 war risk insurance, the premiums of which were paid up to the date of discharge. The date of discharge was April 4 and the policy was in effect

up to May 30, 1919, and the policy lapsed June 1, 1919. I have been appointed the administratrix of my son's estate. (Letters of Administration of said estate issued to Flora H. Scarborough were introduced in evidence and marked Plaintiff's Exhibit No. 1.)

For two years prior to the war, my son had been working for R. A. Scarborough, another son, on the farm in New York State, about forty miles out from Buffalo. I saw my son frequently during those two years; he came home nearly every week end. He was 5 feet 3 and weighed about 120 pounds immediately before he went into the service and the general condition of his health was very good. I did not see him during the time he was in service at all. I saw him when he returned from the service on April 4, 1919. He stayed with me most of the time until I came West, about a month later."

And (R. 22):

"When I first saw him when he returned from the army he was completely changed, his color was poor he was very sallow and his general disposition was so changed that we all noticed it, not only the family, but all our friends. Before he went he was very deliberate, and very good natured but when he came back, he was easily disturbed, he was not anything like he was before and he would sit down for some time and not say a word, and would not answer any questions you would ask him, and he was very erratic and very nervous and had no appetite and did not sleep

well at all. He used to complain of headaches quite a bit after he came back and when we talked to him about working he said he didn't feel like working. During the month that he was with me he didn't do anything. He was supposed to be staying with me and he would start out in the morning and go down town and at night I would get a telephone message from down on the farm that he was there, and sometimes he would go out in the field to work and they would not know where he was, and I would telephone down at night that he had come back to Buffalo. We could not depend on him."

R. A. Scarborough testified by deposition as follows (R. 25-26):

"I am a brother of Floris Scarborough, the deceased insured. I saw him practically every day during the year previous to his entering the United States Army on September 25, 1917. He was living with me in Johnson Creek, New York, at the time he entered the army in 1917. He was a farmer and worked for me on the farm. I saw him on or about September 25, 1917 when he entered the army, and as I observed it, his health was good at that time. I have never known him to have any trouble with his health previous to entering the service and he lived with me from 1913 until he entered the service. I saw him immediately after his discharge from the army at Middleport New York, as soon as he arrived home from Long Island. As I observed it, the condition of his health at that time, was poor. He wasn't able to do anything. He looked all right, a little pale perhaps. He complained of weakness. When he

came home he said he was going to try to farm and was going at it strong, but he couldn't do anything. Sometimes he would do the chores. Some days he would work a half day and some days only two or three hours. He couldn't go to work and stick to it. He couldn't do any work.

As to his condition in April, 1919, compared to what it was in October or November of 1919, that is a hard question for an ordinary person to answer. He was thinner in October and November. He couldn't work. There was no improvement in his health during that time. As far as I observed, it was the other way if anything. To my knowledge he did no work after his discharge from the army. He did not work steadily, a half day at a time, quarter of a day, some days not at all. He made his home with me,—all three of us boys. I can't remember if he worked for anyone else besides us boys or not. I can't recall any instance: of course that is ten or twelve years ago. He was sick. He was not able to work. He complained of being weak, first in his leg and then in his arm; sometimes one leg, sometimes the other; sometimes one arm, sometimes the other. When he entered the army he was able to go out and do anything, was stronger and able to do anything, and when he came out of the army he was not able to do anything. He had a scar on his leg right by his ankle."

And on cross-examination the witness testified (R. 27-28) as follows:

"Prior to September 25, 1917, I saw him every day he worked on my farm. Every day he was under my surveillance. The farm consisted of

100 acres. To the best of my knowledge and belief he was out working on the farm. At times he was at one end of the farm and I was at the other end. He came to Middleport New York as soon as he got out of the army, within a day or two. I said he looked a little pale. I didn't notice any difference in his weight, probably a variance of a few pounds. I noticed no difference in his stature or his walk. He started work around the farm right away. I agreed to pay him a salary but never did. He never got started to work. He would work on the farm for a few hours, do the chores and after a while I would find him resting. He stayed with me quite a few days and one day he said, 'Well I can't do much around here, guess I will go see Mother.' Mother was in Buffalo at that time. While he was with me he worked a few hours a day. He stayed with me for several months and then returned to our mother. After that he went to Lee and Marshall our brothers. There was a period of time when he was away from my place but it would be hard to say how long, as I would see him every little while. I say he could not do much work because he was weak. During the first few months after he returned from the army, he did not see a doctor to my knowledge. The first time he consulted a doctor to my knowledge was the 16th day of December. I know he injured his thumb. The thumb of one hand. I don't remember which one. The night I took him to the doctor the hand was not cut, there were no bruises but practically the whole hand was swollen some."

Dr. Murray F. Mudge, the Scarborough family physician testified by deposition as follows (R. 30-31):

"I knew Floris Scarborough ever since he was four or five years old. I have been their family physician at Middleport, New York. His health prior to entering the service, was good, so far as I know. I never treated him for any serious condition. I saw him frequently unprofessionally. After his discharge from the army he came to my office on December 18, 1919 for consultation. The only thing I can remember treating him for previously, was for poison ivy and that was probably in 1914 or 1915. He came to see me December 18, 1919 about his hand and remained under my care until March 11, 1920. I made a diagnosis of injury to the thumb swollen and *general run down condition.* The last time I rendered any treatment to him was March 11, 1920. I did not treat him at his death. *I believe there was a connection between the septicemia which caused his death, and previous disabilities. I did not see him from the date of his discharge until December, and it would be impossible for me to state his condition at the time of his discharge from the army. At the time of my first examination I would not state that he was permanently and totally disabled, but upon continuous treatment and further examination (I treated him from December to March) I am convinced he was permanently and totally disabled. I reached that conclusion during that period. I considered at that time that this condition would continue throughout his lifetime."* (Italics ours.)

And on cross-examination, this witness testified (R. 32):

"I decided that Floris Scarborough was permanently and totally disabled within the first month

after treatment. It was a question of how long he was going to live." (Italics ours.)

Charles Scarborough a witness for plaintiff, testified by deposition as follows (R. 33-34):

"After his discharge from the army on April 4, 1919 I first saw him about two weeks later at Buffalo, New York. His health as I observed at that time, was poor. He was thinner than I had seen him last. He gave me the impression, as so many soldiers that I have seen, that he had been shell shocked, he was irritable erratic: he seemed to jump from one thing to another. The only thing he ever complained of to me was that he could not sleep at night. He said he had dreams. I did not pay so much attention to that because I thought it was a reaction from war experience. He was very funny, for instance he would mention to me, 'let's go down to the corner and get a dish of ice cream' and get half way down and before we got down there, he would suggest something else and start up the other way, and he acted funny, is the only way I can describe it.

To my knowledge he had always been healthy and strong, always sort of an easy-going, deliberate sort of a fellow and when I saw him he was jumpy, erratic, nervous and got mad awfully easy. Naturally I thought there was something wrong with him."

Dr. Samuel E. Welfield, a witness for plaintiff testified in court, as follows (R. 35-36):

"I am quite familiar with the disease of septicemia in its various complications. Septicemia means a general infection of the system, having

its entry through the blood stream, primarily some source of infection, such as having a wound in any part of the body. It is usually caused by a germ which is a virulent pus-producing germ and usually found in infected wounds: these germs may get into the blood stream and produce septicemia in either active or latent form. Septus merely has reference to the condition of the infection,—a person having septicemia has a septus, a person having an infected wound we would say that he was in a condition of septus. In the latent condition of septus it may go on for years, it may go on for three or four or five years even, and then have an acute effect on some organ such as the heart or some other organ in the body, and there set up an acute infected process. There are degrees of septus condition. The most common physical effect of septicemia would be the feeling of weakness, loss in weight, decrease in the red blood cells, increase in the whites, and a general feeling of not being well or that something is wrong.

"It is possible for a person to have septicemia caused by some point of infection, such as an injury and have that condition continue in the body, although the point where it originally was is healed: it does not happen very frequently, but it does happen. It might be possible that a person in October 1918 received an injury to his leg in a form of two wounds from shrapnel and that in April of the following year he had some of the symptoms of septicemia as loss of weight and general run down condition and at the time the wound, as far as external appearance is concerned, is completely healed, and that the condition of septicemia might be traceable to the orig-

inal injury. In other words a person might have septicemia after the wound that caused it is healed. If a person had a condition of septus or septicemia either an illness of some kind or another injury would be likely to bring that to a head. If a person has an injury to a thumb and within a month the thumb starts to swell and the hand swells and it becomes progressively worse, there is no limit to the time for the condition of septicemia to exist. It might run on for several years, even after it had showed itself externally. If a person is found to have a slightly pale color and a general weakness, irritability and nervousness, a slight loss of weight, a slight stooping condition, apparent inability to exert himself, if he suffers from bad dreams, poor appetite and inability to sleep, these are symptoms of a septic condition. These symptoms would be enough in itself to diagnose it a condition of septus, provided there was no external evidence of any other disease."

And on cross-examination, this witness further testified as follows (R. 36-37):

> "In answer to the hypothetical question, I said it was possible in the case given to me, that septicemia might be traceable to the original wound received some years before" and "considering the symptoms that were mentioned in the hypothetical case, it would be possible to trace such septicemia back to the original injury in the leg."

On redirect examination this witness further testified (R. 38-39):

"Hematona is a blood clot from breaking a blood vessel and if we pick the skin the blood is underneath the skin and then instead of being absorbed as it usually is, the usual case is for the thing to become infected and we have to operate on it. If a person is in a healthy condition, in the usual case, it would be absorbed. Septus is the condition of the body: septicemia is the disease. If a person had septicemia and had this blood blister, the possibility of absorption would be that much less: if a person had a healthy normal blood, the probabilities are that it would be absorbed.

"As to the cure for septicemia, it is a very difficult thing. First of all you have to try to get at the primary cause. If there is an acute infected process, the idea is to clear that up and abate the infection of the blood stream, placing the patient under a condition of rest, very careful diet, and treating him the same as you would a T. B. case or any other case of infection."

On recross examination this witness further testified as follows (R. 39):

"In my experience in handling these cases of septicemia, I would say within my ten years' experience I have probably had half a dozen cases where the septicemia was caused by a new injury aggravated by an old well-healed wound or injury caused at least one year prior to the later wound which caused infection. The total number of cases treated by me during that time, conservatively, is 2,000 and the average where septicemia was so caused would be about six out of two thousand."

ARGUMENT.

THE RULE.

In all the multifarious decisions on the subject, nowhere do we recall the rule more clearly stated than in the language employed by Mr. Justice Sawtelle of this court, in *United States v. Burke,* 50 Fed. (2d) 635, where on page 655 he states:

> "At the end of the entire testimony, the defendant made a motion for a directed verdict in its favor on the ground that the evidence was not sufficient to establish a prima facie case. The question is whether the evidence tending to establish total and permanent disability while the policy was in effect, was sufficient to take the case to the jury. We do not weigh the evidence but inquire merely whether there was sufficient evidence to sustain the verdict and judgment."

And on page 656, Judge Sawtelle further says:

> "Courts often experience great difficulty in determining whether a given case should be left to the decision of the jury or whether a verdict should be directed by the court. Fortunately however, the rule in this circuit has been definitely settled and almost universally observed. Judge Gilbert, for many years and until recently, the distinguished senior judge of this court, whose gift for expression was unsurpassed has stated the rule as follows:
>
> > 'Under the settled doctrine as applied by all the federal appellate courts, when the refusal to direct a verdict is brought under review on writ

of error, the question thus presented is whether or not there was any evidence to sustain the verdict, and whether or not the evidence to support a directed verdict as requested, was so conclusive that the trial court in the exercise of a sound judicial discretion should not sustain a verdict for the opposing party.

'And on a motion for a directed verdict the court may not weigh the evidence, and if there is substantial evidence both for the plaintiff and the defendant, it is for the jury to determine what facts are established even if their verdict be against the decided preponderance of the evidence. Travelers' Ins. Co. v. Randolph, 78 F. 754, 24 C. C. A. 305; Mt. Adams & E. P. Inclined Ry. Co. v. Lowery, 74 F. 463, 20 C. C. A. 596; Rochford v. Pennsylvania Co., 174 F. 81, 98 C. C. A. 105; United States Fidelity & Guaranty Co. v. Blum (C. C. A.) 270 F. 946; Smith Booth-Usher Co. v. Detroit Copper Mining Co., 220 F. 600, 136 C. C. A. 58. In the case last cited this court said:

'The right to a jury trial is guaranteed by the Constitution, and it is not to be denied, except in a clear case. The foregoing decisions, and many others that might be cited, have definitely and distinctly established the rule that if there is any substantial evidence bearing upon the issue, to which the jury might properly give credit, the court is not authorized to instruct the jury to find a verdict in opposition thereto'. United States Fidelity & Guaranty Co. v. Blake (C. C. A.) 285 F. 449, 452.'

"Again 'such an instruction would be proper only where, admitting the truth of the evidence for the plaintiff below, as a matter of law, said plaintiff could not have a verdict.' Marathon Lumber Co. v. Dennis, 296 F. 471 (C. C. A. 5).

See also the following recent decisions of this court: U. S. v. Barker (C. C. A.), 36 F. (2d) 556; U. S. v. Meserve (C. C. A.), 44 F. (2d) 549; U. S. v. Rice (C. C. A.) 47 F. (2d) 749; U. S. v. Stamey (C. C. A.) 48 F. (2d) 150; U. S. v. Lawson (C. C. A.), 50 F. (2d) 646."

And again in *Sorvik v. U. S.,* 52 Fed. (2d) 406, this court per Sawtelle, C. J., said:

"The test to be applied in such a case, of course, is not whether the evidence brings conviction in the mind of the trial judge: it is 'whether or not the evidence to support a directed verdict as requested, was so conclusive that the trial court in the exercise of a sound judicial discretion should not sustain a verdict for the opposing party.' United States Fidelity & Guaranty Co. v. Blake (C. C. A. 9), 285 F. 449, 452, and cases there cited: and United States v. Burke, 50 F. (2d) 653, decided by this court June 1, 1931 and cases there cited.

"And in measuring the quantum of evidence necessary to sustain a possible verdict for the plaintiff, we must bear in mind the remedial purposes of the World War Veterans' Act (38 U. S. C. A. 421 et seq.) which the courts have repeatedly held should be liberally construed in favor of the veterans. United States v. Eliasson (C. C. A. 9), 20 F. (2d) 821, 824; United States v. Sligh (C. C.

A. 9) 735, 736, certiorari denied, 280 U. S. 559, 50 Ct. 18, 74 L. Ed. 614; United States v. Phillips (C. C. A. 8), 44 F. (2d) 689, 692; Glazow v. United States (C. C. A. 2), 50 F. (2d) 178."

See, also.

Corsicana National Bank v. Johnson, 251 U. S. 68; 40 S. Ct. Rep. 82; 64 L. Ed. 141;
Hayden v. U. S., 41 Fed. (2d) 614, (C. C. A. 9);
Mulivrana v. U. S., 41 Fed. (2d) 734, (C. C. A. 9);
U. S. v. Rasar, 45 Fed. (2d) 545, (C. C. A. 9);
Vance v. U. S., 43 Fed. (2d) 975, (C. C. A. 7);
Malavski v. U. S., 43 Fed. (2d) 974, (C. C. A. 7);
U. S. v. Godfrey, 47 Fed. (2d) 126, (C. C. A. 1);
Ford v. U. S., 44 Fed. (2d) 754, (C. C. A. 1);
Carter v. U. S., 49 Fed. (2d) 221, (C. C. A. 4);
Kelley v. U. S., 49 Fed. (2d) 897, (C. C. A. 1);
U. S. v. Tyrakowski, 50 Fed. (2d) 766, (C. C. A. 7).

The closest case we have been able to find bearing on the particular facts of the case before us, is that recently decided by the 10th Circuit, in *U. S. v. Gower,* 50 Fed. (2d) 370. On account of its close similarity, we quote the court's opinion in full:

"Lewis, Circuit Judge.

Claude Gower, a soldier in the World War, was discharged from service on June 3, 1919, and immediately returned to his father's home in Ok-

lahoma. He sought employment of different kinds, but after short service in each, he in turn quit because he could not continue on account of his physical and mental condition. Early in November, 1919, he was accidentally and fatally shot. While in the military service two policies of term insurance of $5000.00 each, were issued to him on which premiums were paid to July 31, 1919.

His father and mother, appellees here, brought this suit on the policies as beneficiaries and recovered. They alleged that their son suffered total permanent disability during the life of the policies. The defendant below has appealed and contends that the verdicts are not sustained by the proof, hence the court erred in overruling defendant's motion for an instructed verdict in its favor; that the case should not have been submitted to the jury. That is the only error assigned, and the argument here is that the evidence does not sustain a finding that the insured suffered total permanent disability while the policies were in force.

On that subject Doctor King, who had practised medicine for twenty-five years, and had served as physician in the Medical Corps of the United States Army, was called as a witness. He saw and treated the insured twice a week for three or four weeks after his return home from military service. He testified that the physical and mental condition of Gower, was very poor. He had a rapid heart, listless expression, undernourished condition, both lungs abnormal, and more or less adema of the hands and face; that

from the history of the case he determined that the patient was suffering from gas poison, and that in his opinion he was not able to perform any substantial and gainful work; that while he was attending him he did not improve to amount to anything. He would have spells like asthma. When asked as to whether Gower might have recovered, had he not been accidentally shot, witness said he had a chance to get well. Asked whether or not his condition was permanent, he answered 'No, sir'; and asked whether he was able to say his condition was temporary he answered 'No, sir.'

Members of insured's family and others for whom he tried to work, described his condition, action and inability to continue except for very brief periods at different kinds of labor. A grocer who employed him to deliver groceries in the town testified that when he would direct him to go to one part of town, he would go to another part, and he would have to go, or send someone after him; that his mind seemed to wander; he kept trying to get him to work for some eight or ten days; that he was flighty and trembly, would give out and sit down. He tried other employment. He shucked corn for a day or so, and quit because he was sick. His appetite was poor and he didn't sleep much. He tried to work in the cane at another place, but quit in a short time and was sick in bed there for about three days. He tried to pick cotton, but became short of breath and had to quit. There was testimony that he fell from a horse for no apparent cause. Another witness testified he did not seem the same boy after he came

back, that he was before, that he could not hold down a job. Another neighbor testified that he was just silly, foolish. His father testified that he worked for about a week with him after he came home, and had to quit. His mother testified that he complained of headaches, and of the back of his head and of his breast; and after he worked a little he was unstrung and nervous. That he was wakeful, didn't rest at night, mumbled and groaned in his sleep, and had poor appetite. At times his hands would be swollen.

Other neighbors who saw and talked with Gower after his return, testified they did not notice any change in him, either mentally or physically. We do not doubt there was ample proof to sustain a finding that insured was totally disabled to engage in any gainful occupation on his return home, and that that disability continued while the policies were in force. A contrary conclusion in our judgment, would be against the greater weight of the evidence.

The real question here is whether the total disability thus proven and evidently found to exist, while the policies were still in force, was of such character and of such grip upon insured's vitality as to cause it to be reasonably certain that it would be permanent, thus disabling insured to follow continuously any substantially gainful occupation during the remainder of his natural life.

Doctor King, the only witness called who was competent as an expert to give an opinion on the subject of the extent of the soldier's disability, was not asked if that disability was total and permanent. He was asked whether the condition under

which he found the soldier was a permanent condition, and he answered, No. His condition might have been fluctuating,—better and then worse and vice versa,—but still in the doctor's opinion one of permanent and total disability to ever follow continuously, any substantially gainful occupation. In fact, he said the soldier's condition was not temporary, and had previously said he was not able to perform any substantial and gainful work. He also testified the soldier had a chance to get well,—a possibility, not a probability. So, it cannot be fairly said the verdicts were opposed to the judgment and opinion of the only witness competent to speak on this vital subject. Moreover, expert testimony is only an aid to the solution of the main issue. It cannot be arbitrarily ignored or indolently accepted, and after it has been considered by the jury, if they believe their own experience, observations and common knowledge, as applied to the facts in the case, will guide them to a solution and verdict, they have a right to follow their own convictions, thus reached, although in doing so, their verdict may be contrary to the opinion evidence of experts on the subject. United States Smelting Co. v. Parry, (C. C. A.) 166 F. 407, 411; Head v. Hargrave, 105 U. S. 45, 47-49, 26 L. Ed. 1028; The Conqueror, 166 U. S. 110, 17 S. Ct. 510, 41 L. Ed. 937; Jones on Evidence, (2d. Ed.) 1373. After consideration of the evidence in the record, both that of laymen and the attending physician, as to the soldier's ailments and their effects upon him physically and mentally, we cannot hold that the proof does not sustain the verdicts.

Judgments affirmed."

ANSWER TO APPELLANT'S BRIEF.

We think opposing counsel's brief sounds more like a jury argument, than a brief in an appellate court,—that he attempts to argue a conflict of the evidence rather than a fair résumé of and a discussion of the sufficiency of the evidence,—the only question before this court.

We think counsel for appellant is mistaken in his conclusions when he states that Dr. Mudge, plaintiff's witness testified that the deceased soldier was not permanently and totally disabled when he first saw him in December of 1919. The exact language of Dr. Mudge's testimony is as follows (R. 30-31):

> "I did not treat him at his death. I believe there was a connection between the septicemia, which caused his death, and previous disabilities. I did not see him from the date of his discharge until December and it would be impossible for me to state his condition at the time of his discharge from the Army. At the time of my first examination I would not state that he was permanently and totally disabled, but upon continuous treatment and further examination (I treated him from December to March), I am convinced he was permanently and totally disabled. I reached that conclusion during that period. I considered at that time that this condition would continue throughout his lifetime."

And, again, on cross-examination (R. 32):

> "I decided that Floris Scarborough was permanently and totally disabled within the first

month after treatment. It was a question of how long he was going to live."

Thus, we submit that what Dr. Mudge testified to, in this respect, is simply that when he saw Scarborough the deceased soldier, the first time on December 18, 1919, he could not say from that one examination and treatment alone, that he was permanently and totally disabled, but after he had continued to treat him for a few weeks, the picture became perfectly clear and it was then all too plain to him that the deceased was permanently and totally disabled. We think the inference to be drawn, is not that he didn't believe Scarborough was permanently and totally disabled, but simply that he didn't think so the very first time he saw him on December 18, 1919,—in other words that the doctor's testimony relates not to the date the soldier's permanent and total disability began, but merely to the time the doctor made up his mind to this effect. In our opinion one of the best statements on this subject ever rendered by a court, is that appearing in the court's opinion in *Shoemake v. United States,* U. S. District Court, Eastern District of Kentucky, decided Nov. 19, 1931, wherein the court held:

> "*Held,* that in this court's judgment one who is afflicted with pulmonary tuberculosis, even though it may be incipient, is then totally disabled. He should engage in no occupation or do any work. His whole time should be taken up with efforts to check the advance of the disease. Though totally disabled he may not then be permanently disabled. Had he brought this suit immediately after his

> discharge he might have had trouble making out that such was the case. But subsequent events showed that the disability was permanent. And this court knows of no reason why one may not argue from effects to causes. He would have been justified in delaying the bringing of suit until he ascertained whether his disability was permanent. Judgment for Plaintiff."
>
> *Shoemake v. United States,* U. S. Dist. Court, Eastern Dist. of Ky. Decided November 19, 1931.

Sight must not be lost of the rule which requires not only that every reasonable inference to be drawn from appellee's evidence must be indulged in her favor, but that the policy itself must be liberally construed in favor of the insured.

Counsel in his brief, quotes quite extensively from the deposition of the Government witness, Dr. Philbrick. The lower court was not necessarily bound by Dr. Philbrick's evidence for two reasons: first, Dr. Philbrick being a witness for the defendant, neither plaintiff, nor the trial court was bound by his evidence, and second: Dr. Philbrick only saw the deceased soldier for nine days prior to his death, during all of which time he was desperately and fatally ill, and therefore the doctor was not in a position to give evidence of any great weight, concerning Scarborough's physical condition at the time of his discharge from the Army, and it was not only the privilege but the duty of the lower court as the trier of fact, to give to his testimony only such weight as he considered

was due it. Evidently and properly so, he gave it very little,—at any rate such conflicting testimony presents no question for this court.

In considering the question of medical evidence and its non-conclusive effect, in a case where the plaintiff's own doctors testified he was not permanently and totally disabled, the Circuit Court of Appeals for the 10th Circuit in *Barksdale v. United States,* 46 Fed. (2d) 762, at page 764, in reversing a directed verdict and granting a new trial to the plaintiff, said:

> "However this may be, the jury might well have been inclined to take the positive evidence of the plaintiff to the opinion of the medical men which he called in his behalf. Medical men indulge, very generally, in theorizing on the affairs of life, while the living of life is a very practical affair. What it is possible for one man to do, is utterly impossible for another to perform, though apparently both are in the same mental and physical condition."

CONCLUSION.

We submit that fairly construed, and drawing only justifiable inferences from it, the evidence shows:

1. That the deceased soldier's wounds received in battle in France became infected and caused a latent septicemia from which he was suffering at the time of his discharge from the Army, and which was in fact the actual cause of his death ten months later. This is shown by the uncontroverted evidence of the deceased soldier's physical and mental condition immediately

after his discharge; by the testimony of Dr. Welfield that these symptoms are clearly those of septicemia, and by the deposition of Dr. Mudge who stated that he found a septic condition several months after the deceased's discharge from the Army and believed that there was a connection between the original wounds received in battle and this septic condition. The failure of the Government to produce the army records —which of course it has in its possession—makes the proof of this more difficult, but we believe it places no strained construction upon the evidence to say that the above is a reasonable inference from facts actually proved.

2. That when Scarborough, the deceased soldier returned from the war on April 4, 1919, he was a complete physical wreck and unable to work or earn his livelihood continuously, or otherwise, and that this condition of his health continued not only at the time his insurance lapsed at midnight on May 31, 1919, but at all times up to the time of his death on March 20, 1920.

3. That the injury to his thumb in the fall of 1919 (which didn't even break the skin, or cause an open wound) was merely a link in the chain of circumstances which caused his death, and, that his death was primarily caused by the septicemia, the definite evidence and symptoms of which were manifest at the very time he returned from the Army, and at a time when his insurance was in full force and effect, and,

4. That there is not even a scintilla of evidence that the deceased soldier, at any time since his discharge

from the Army had the ability to continuously follow a gainful occupation, but that the evidence of the lay witnesses, conclusively establishes the very opposite, and,

5. That the deceased, before the war an affable, agreeable hard working boy from the farm, returned from the war, a physical wreck, and totally and completely unable to do any substantial work, and wholly and completely incapable of earning his livelihood, and,

6. That the policy was designed, and premiums collected from the soldier, to insure against this very contingency.

The rule concerning employability, is probably nowhere more clearly stated than in *U. S. v. Cox,* 24 Fed. (2d) 944, (C. C. A. 8) where at page 946, it is said:

> "Ability to continuously follow a substantial, gainful occupation, implies ability to compete with men of sound mind and average attainments, under the usual conditions of life."

It is respectfully submitted that the record here is conclusive that Scarborough, the deceased soldier, had no such ability, at any time between his discharge from the Army and his death, and that therefore the judgment should be affirmed.

Respectfully submitted,

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Dated, San Francisco,
January 16, 1932.